
Research Article

Legal Interpretations of Women, Rape & Criminal Law (Amendment) Act, 2013

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Abstract:

“Women have always been subject to various heinous crimes. Women are easy victim of crimes because of their gender. There are various heinous and grave crimes that are solely meted to the women. One of the most heinous and grave crime meted to women which physically and emotionally affects the women is rape. Laws has always changed to ensure the protection of women in every aspect. Rape is an offence which is most traumatic in its nature. Prior to Criminal Law Amendment Act,2013 the definition of rape was confined to penal-vaginal intercourse between a male and a female, but after Criminal Law Amendment Act,2013 the definition of rape in the penal code is now expanded beyond penile vaginal penetration, to include all forms of non-consensual penetrative sexual acts by men on women. Moving away from a patriarchal framing of the offence, the offence responds more accurately to how women experience penetrative sexual assault. The new amendment defines ‘consent’, to mean an unequivocal agreement to engage in a particular sexual act; clarifying further, that the absence of resistance will not imply consent. When a girl becomes the victim of rape she passes through mental, social and physical difficulties. The effects of rape can include both the initial physical trauma as well as deep psychological trauma. In this paper the concept of rape in the context of legal changes is dealt.”

Introduction

There are various heinous and grave crimes that are solely meted to the women. One of the most heinous and grave crime meted to women which physically and emotionally affects the women is rape. Rape is a crime of violence; it is not sex. At common law, rape was defined as the unlawful carnal knowledge of a woman, without her consent. Carnal knowledge was defined as sexual intercourse. Sexual intercourse implied genital copulation. Genital copulation, in turn, connoted the act of sexual intercourse. Unlawful carnal knowledge required sexual penetration, however slight. Today, in addition to the requirement of carnal knowledge, most rape statutes require force or threat of force against the will and without the consent of the victim. Rape is a stigma which exists in the society from a long time. The dictionary meaning of word rape is “the ravishing or violation of a woman,” or “to force (someone) to have sex with you by using violence or the threat of violence:”¹ Rape is a crime, which has a devastating effect on the survivors; it has been described as a “beginning of a nightmare”. The aftershocks include depression, fear, guilt-complex, suicidal-action, diminished sexual interest. etc. Rape is an invasion of a woman's body in which her private, personal inner space is violated. The act of rape denies woman autonomy by abridging her right to determine when, with whom, and how she will allow an individual to enter her zone of body privacy. In addition to the physical harm, the crime of rape grants man domination over the woman's zone of body privacy.

Historical Perspective

The word rape itself originates from the Latin verb rapere: means to seize or take by force. The word originally had no sexual connotation and is still used generically in English. The history of rape, and the alterations of its meaning, is complex. In Roman law, rape, or raptus was classified as a form of crimen vis, "crime of assault." The concept of raptus was applied to the abduction of a woman against the will of the man under whose authority she lived, and sexual intercourse was not a necessary element. Like theft or robbery, rape was originally considered a "private wrong" iniuria privata, a crime between the abductor and the legal

¹ merriam-webster dictionary

guardian of the woman in question. It was made into a "public wrong" (*iniuria publica*) by the Roman Emperor Constantine.² In ancient history, rape was viewed less as a type of assault on the female, than a serious property crime against the man to whom she belonged, typically the father or husband. The loss of virginity was an especially serious matter. The damage due to loss of virginity was reflected in her reduced prospects in finding a husband and in her bride price. This was especially true in the case of betrothed virgins, as the loss of chastity was perceived as severely depreciating her value to a prospective husband. In such cases, the law would void the betrothal and demand financial compensation from the rapist, payable to the woman's household, whose "goods" were "damaged". From the classical antiquity of Greece and Rome into the Colonial period, rape along with arson, treason and murder was a capital offense. Those committing rape were subject to a wide range of capital punishments that were seemingly brutal, frequently bloody, and at times spectacular. In the 12th century, kinsmen of the victim were given the option of executing the punishment themselves. In England in the early fourteenth century, a victim of rape might be expected to gouge out the eyes and/or sever the offender's testicles herself.³ Despite the harshness of these laws, actual punishments were usually far less severe: in late Medieval Europe, cases concerning rapes of marriageable women, wives, widows, or members of the lower class were rarely brought forward, and usually ended with only a small monetary fine or a marriage between the victim and the rapist.⁴ The medieval theologian Thomas Aquinas argued that rape, though sinful, was much less sinful than masturbation or coitus interruptus, because it fulfilled the procreative function of sex, while the other acts violated the purpose of sex.⁵

Definition of Rape

Although the legal definition of rape varies from nation to nation, rape is generally defined as forced or non-consensual sexual contact. Rape is forced, manipulated, or coerced sexual contact by a stranger, friend or acquaintance. It is an act of aggression and power combined with some form of sex. A person is forced into sexual contact through verbal coercion, threats, physical restraint, and/or physical violence. Historically, rape was defined as unlawful sexual intercourse with a woman against her will. The essential elements of the crime were sexual penetration, force, and lack of consent. Women who were raped were expected to have physically resisted to the utmost of their powers or their assailant would not be convicted of rape. Additionally, a husband could have sex with his wife against her will without being charged with rape commonly known as marital rape. In law, rape is defined as vaginal or anal penetration in the absence of lawful consent. However, the source of penetration (e.g., penis, finger, or objects), object of penetration (e.g., vagina, anal, or oral), gender of perpetrator, and victim and definition of consent varies greatly across jurisdictions.

Rape is the fourth most common crime against women in India.⁶ According to the National Crime Records Bureau 2013 annual report, 24,923 rape cases were reported across India in 2012.⁷ Rape in India is the most heinous offence committed on a woman. It is worse than a murder. Though, it is objectionable to state rape as a crime against whole social environment but in some part of the world, it is considered that even women can commit rape depending upon the definition rape in those regions. It is restricted only to the crime against matriarchal social environment. Rape at present stage is the infringement of women right and liberty. Rape is, for many feminist, the ultimate expression of patriarchal order, a crime that epitomizes women's oppressed status by proclaiming in the loudest possible voice, the most degrading truth about women that a hostile world has to offer.

Prior to Criminal Law Amendment Act, 2013 the variations in definitions as to what constitutes sexual intercourse was part of the problem in defining what has to be penetrated. With respect to the raping of a woman by a man, most statutes throughout the world require penetration of the vagina. Defining what has to be penetrated is significant because if rape is viewed as a crime against the woman, then any conduct that is perceived as violate to the woman should be classified as rape. Many statutes, with respect to the penetration element, provide that an offender has to engage in sexual intercourse. It is assumed that penetration has to be effectuated in order for there to be sexual intercourse. The statutes, however, fail to state what has to be penetrated--the vagina, the vulva, the labia, or the clitoris? Some states refer to penetration of the female organ without further defining penetration. The recent Criminal Law Amendment Act, 2013 removed various doubts.

Statutory Definition of Rape prior to Criminal Law Amendment Act, 2013

Before February 3, 2013, the Indian penal code defined rape under Section 375 as:

Section 375 of IPC

Rape. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman

²Brundage, James A., "Rape and Seduction in Medieval Canon Law", in *Sexual Practices and the Medieval Church*, edited by Vern L. Bullough and James Brundage, Buffalo, 1982, p.141

³ "The Medieval Blood Sanction and the Divine Beneficence of Pain: 1100–1450", Trisha Olson, *Journal of Law and Religion*, 22 JLREL 63 (2006)

⁴ Eckman, Zoe. "An Oppressive Silence: The Evolution of the Raped Woman in Medieval France and England", *Historian: Journal of the Undergraduate History Department at New York University* 50 (2009). pp. 68-77.

⁵ Alan Soble, *Sexual Investigations*, NYU Press, 1998, p.10-11.

⁶ NCRB, *Crime against women*, Chapter 5, Annual NCRB Report, Government of India (2013), page 81

⁷ National Crimes Record Bureau, *Crime in India 2012 - Statistics* Government of India (May 2013)

circumstances falling under any of the six following descriptions:-

Firstly. — Against her will.

Secondly. — Without her consent.

Thirdly. — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in the under in fear of death or of hurt.

Fourthly. — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. — With or without her consent, when she is under sixteen years of age.

Explanation. — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. — Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

This definition of rape was confined to penal-vaginal intercourse between a male and a female.

Changes brought out by Criminal Law Amendment Act, 2013

Following the gang rape and murder of the unfortunate physiotherapy student in a moving bus in National Capital the country was shaken. The publicity of the incident and public outrage forced Government to amend the law on rape and its punishment. Late J. S. Verma, former Chief Justice of India, was appointed by the Central Government, to suggest amendments to criminal law to sternly deal with sexual assault. The key objective of the Commission was to review for possible amendments to the criminal law and suggest measures for faster trials and harsher penalties for vicious offences related to Violence against Women. Taking further cognizance of the strident storm of public protests in general and a tribute to Nirbhaya victim in particular, on January 23, 2013, the commission submitted its recommendations by identifying 'lack of good governance' as the central cause of Violence against Women. The commission goes on to criticise the government, the abysmal and old-fashioned police system alongside public apathy in tackling Violence against Women, and thereby, recommends dramatic transformation in legislations.

Based on some of the recommendations of the Justice Verma Committee report, an anti- rape Ordinance was enacted and signed by the Honourable President of India, Mr Pranab Mukherjee on February 03, 2013. The Criminal Law (Amendment) Bill, 2013, passed in the Parliament (Lok Sabha and Rajya Sabha respectively on March 19 and 21, 2013) replaced the promulgated Ordinance, which lapsed on April 04, 2013. However, as per the Gazette Notification on, April2, 2013, the word 'bill' was replaced by the word 'Act'.⁸

Popularly, known as the Anti-rape Act Criminal Law Amendment Act, 2013 amends the Indian Penal Code (IPC), 1860, the Code of Criminal Procedure (CCP), 1973, the Indian Evidence Act (IEA), 1872 and the Protection of Children from Sexual Offences Act, (PCSO), 2012.

New Definition of Rape

Section- 375 of IPC: Rape:-

A man is said to commit "rape" if he

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, Under the circumstances falling under any of the following seven descriptions:—

First, against her will.

Secondly, without her consent

Thirdly, with her consent, when her consent

has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly, with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the

⁸ The Gazette of India, Department of Publication, Ministry of Urban Development, Government of India, <http://egazette.nic.in/RecentUploads.aspx?Category=1>(accessed on 15November, 2014)

administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly, with or without her consent, when she is under eighteen years of age *Seventhly*, when she is unable to communicate consent

Explanation 1.—for the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Changes brought out by Criminal Law Amendment Act, 2013.

While the earlier definition of rape was confined to penal-vaginal intercourse between a male and a female, the new definition has brought the following acts into its ambit, commission of which under the circumstance prescribed by the section would constitute rape;

- a. Penile-Oral/Anal/Urethral intercourse between a male and a female,
- b. Insertion of a foreign object or any part of body other than penis into the vagina, urethra or anus of a woman,
- c. Manipulation of any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman,
- d. Application by a man of his mouth to the vaginal, anus, urethra of a woman

The provision regarding 'manipulation of a part of the body of a woman' would mean that even if the act of penetration is not performed by the man, he shall still be liable to be punished for rape. Moreover, all the acts mentioned in Section 375 which constitute rape also include any act on the part of the man whereby he makes the woman to do those acts with any other person. For example- If 'A' has not even touched a woman but has forced her to go through a penile-vaginal intercourse with another person 'B', 'A' shall also be liable and punished for rape.

A woman who is unable to communicate consent has been afforded a special protection which might be misused. Even if she gives consent for any of these acts through gestures and the male only upon such consent performs such acts, she shall still be entitled to lodge an FIR against the male person going by the new provision.⁹ The definition of consent which has been qualified by a proviso rendering the sole fact of non-resistance by the woman to the act of penetration as insufficient for establishing consent by defence would on one hand lend more teeth the rape laws while on the other, deprive the defence of a very effective reliance it has for long placed on the medical evidence for establishing non-resistance and then subsequently deducing victim's consent from it. Further, the Act has increased the age of consent to 18 years, which remained 16 since 1983.

The most important change that has been made is the change in definition of rape under IPC. Although the Ordinance sought to change the word rape to sexual assault, in the Act the word 'rape' has been retained in Section 375, and was extended to include acts in addition to vaginal penetration. The definition is broadly worded with acts like penetration of penis, or any object or any part of body to any extent, into the vagina, mouth, urethra or anus of another person or making another person do so, apply of mouth or touching private parts constitutes the offence of sexual assault. The section has also clarified that penetration means "penetration to any extent", and lack of physical resistance is immaterial for constituting an offence. Except in certain aggravated situation the punishment will be imprisonment not less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. In aggravated situations, punishment will be rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

A new section, 376A has been added which states that if a person committing the offence of sexual assault, "inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death." In case of "gang rape", persons involved regardless of their gender shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life and shall pay compensation to the victim which shall be reasonable to meet the medical expenses and rehabilitation of the victim. The age of consent in India has been increased to 18 years, which means any sexual activity irrespective of presence of consent with a woman below the age of 18 will constitute statutory rape.

⁹S. 375, Seventh Clause, Indian Penal Code, 1860 (45 of 1860) as amended by the Criminal Amendment Act, 2013.

Marital Rape

Marital rape was criminalized in the amended penal code only when the couple was 'judicially' separated (under a judicial order), not otherwise, for a maximum sentence of 2 years. The law has now expanded criminalization of marital rape to all cases of separation, whether under judicial order or otherwise, so long as the spouses are living separately. The sentence has been increased substantially, with a mandatory minimum of 2 years extendable to 7 years. As regard the marital rape is concerned the punishment to be inflicted in case of marital rape has been increased from a maximum punishment of 2 years to 7 years.

Sexual intercourse by husband upon his wife during separation

Section-376B of IPC

Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine?

Explanation.—in this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Impact of Criminal Amendment Act,2013

The definition of rape in the penal code is now expanded beyond penile vaginal penetration, to include all forms of non-consensual penetrative sexual acts by men on women. Moving away from a patriarchal framing of the offence, the offence responds more accurately to how women experience penetrative sexual assault. The law has historically privileged penile penetration of the vagina, distinguishing it from penile-anus or penile-mouth penetration. This distinction served to protect purity of male lineage, and simultaneously, stigmatise non-penile vaginal intercourse, labelled as 'unnatural' carnal intercourse under section 377 of the Indian Penal Code. This is declared an offence not because of the existence of force, but simply because it was deemed 'against the order of nature', serving to criminalise homosexuality. The new definition of rape breaks that binary between natural and unnatural penetrative sex as far as men and women are concerned, punishing all forced penetrative sex by men on women. However, since the law specifies that the victims of rape to be women only, it excludes male, transgender and other victims of penetrative sexual violence from the scope of legal redress thus leaving undisturbed, the stigma attached to homosexuality.

The new amendment defines 'consent', to mean an unequivocal agreement to engage in a particular sexual act; clarifying further, that the absence of resistance will not imply consent. Non-consent is a key ingredient for commission of the offence of rape. The definition of consent therefore is key to the outcome of a rape trial, and has been interpreted systemically to degrade and discredit victims of rape. Studies show how frequently rape judgments conclude that the sex was consensual, based on various factors, including that: the victim was not a virgin, that there were no injuries to show that she put up a stiff resistance, that the victim was 'habitual to sex', that the victim willingly took a ride with or accompanied the accused, that she was acquainted with one of the accused, that she mingled with male friends and so on.¹⁰ Rather than focus on the conduct and actions of the accused, rape trials have historically put the rape survivor under moral scrutiny. An amendment to the Indian Evidence Act in 2003 barred the use of previous sexual history of the victim to discredit the survivor's testimony in rape trials.¹¹ Despite this change, sexual history, real or perceived, has continued to inform every step of the rape prosecution to the survivor's detriment. Against this backdrop, introduction of a clear definition of consent assumes immense importance. The amendment clearly places upon the accused, an obligation to show that an agreement to the sex act in question was obtained, striking at the hostile focus on the survivor's conduct.

Another aspect to consent is the age set by the law when it recognises consent to be valid to the making or the unmaking of an offence. The age below which consent is irrelevant in law sets the benchmark for 'statutory rape', or the age below which the person is deemed to lack legal capacity to consent to the act. This serves to protect children from sexual acts, forced or otherwise, to secure them against abuse and consequences when they lack the capacity to negotiate or understand the nature and consequences of their actions. The cut off age, whatever it be is inevitably arbitrary, so it's often recommended that the law nuance this cut off, to recognize consent between young persons of proximate age group, so as to not taint them with criminality for actions that are consensual; not forced, abusive or violent.

The amendments have strengthened accountability of the police and public servants for acts of omission and commission in

¹⁰ TukaRam v. State of Maharashtra AIR1979 SC185

¹¹ Section146. Questions lawful in cross-examination.- When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-

(1) to test his veracity.

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture:

Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character

respect of sexual offences.

Section 166A of IPC

Whoever, being a public servant,--

(c) fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509, shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.

Under the amended law, there is a minimum mandatory sentence of 6 months for dereliction of duty by public servants, for neglecting to act as required by the law, or disobeying the law to the detriment of a woman. The amendment also clarifies that no prior sanction is required from the government for prosecuting public servants for sexual offences. These changes provide a strong deterrent against police dereliction, providing tools to hold the police accountable for its actions and inaction.

Impact of Rape on Victim

Rape is a sudden, arbitrary, unpredictable event. The victim has no time to prepare. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamount to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm.

When a girl becomes the victim of rape she passes through mental, social and physical difficulties. The effects of rape can include both the initial physical trauma as well as deep psychological trauma. Although rape victims commonly report injuries and issues with their reproductive health after the sexual assault, rape doesn't always involve physical force. The most common and lasting effects of rape involve mental health concerns and diminished social confidence. The emotional trauma caused by rape can be severe and long-lasting. The victim may be affected in many different ways.

Rape victim may experience some or all of these symptoms. They may occur immediately, or may have a delayed reaction weeks or months later. The feelings may be very intense at times. Sometimes the feelings seem to go away for a while and then come back again. Certain situations, such as seeing the assailant or testifying in court, may intensify the symptoms or cause them to re-occur after a period during which you have been feeling better.

Psychological Rehabilitation of Rape Victim

Victims of rape and sexual assaults have the tendency to remain isolated, no urge for work, a sense of self-stigmatization and even moral resignation due to psychological disturbances.

There have also been instances where married rape victims faced discrimination from their in-laws and partners. Therefore Rape victims are entitled to psychological, medical and legal aid besides financial aid under the Scheme for Relief and Rehabilitation for Victim of Rape, which has been enforced since 2005.

Psychologically depressed a rape victim needs help to get over her depression, inferiority feeling and insecurity. Thus she needs psychological counselling and guidance to decide about her future plans. Socially she needs help to be accepted back in her family, in her society and amongst her people. In present scenerio there is need for an integrated physical, psychological and social service for the victim which can be offered under the banner of Social Welfare Agency.

In terms of physical rehabilitation the rape victim needs a place to live and if she is of age, she should be given employment so that she can live in the society with dignity. She needs a place to live which is physically safe, secure and far away from where the rapist cannot attack her again. Mentally she needs help to restore back her lost self-esteem, and dignity, and help to gain back her confidence and composure.

Conclusion

Conclusively it can be said that the recent surge in sexual violence towards women in India require a multi-pronged response that should involve not just organised and non-organized sectors, but also individuals as members of that society as perpetrators of rape often have mental health and psychosocial risk factors that trigger, maintain and perpetuate the offence. Psychiatry can play a constructive and educative role in assisting criminal justice agencies in managing this scourge. The role of the Law Enforcement Agencies remains paramount in tackling rape crimes. Therefore, the law implementing agencies should be adequately provided strategic training to tackle any eventuality with dexterity; even if it necessitates increasing the number sufficiently. There is need to improve public- police relationship, possibly through a good will venture. Challenge therefore, lies in scaling the mechanism of coordination and cooperation from few to all stakeholders of the nation. To be more precise, the executive, who is delegated with the responsibility of investigating a trial in a judiciary, should bear a sense of accountability (rather than misusing its power) in

ferreting out the actuality of the facts so that the outcome of the trial turns out to be unbiased, fair and flawless. At the same time, the incitement and provocation alarmingly disseminated by the media and other information agencies must be shackled appropriately in compliance to decency, morality and social order.

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